

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

Morrow

119040

FILE: B-205629

DATE: July 26, 1982

MATTER OF: National Service Corporation

DIGEST:

1. Where protester merely alleges that procuring agency improperly awarded contract to business that employs a Government employee, protester has failed to meet its burden of proof to show that award was contrary to regulation which generally prohibits awards to concerns substantially owned or controlled by Government employees.
2. There is no statutory or regulatory authority for GAO to issue formal opinions on conflict of interest questions concerning officers and employees of other agencies; instead, employing agencies, Department of Justice, and courts have this authority. Within confines of protest, GAO's review role is to determine whether employee involved may have exerted prejudice for, or bias on behalf of, company which was awarded contract. Based on analysis of evidence of record, award may not be questioned under this review standard.
3. Protest questioning affirmative responsibility decision will not be reviewed in circumstances.

National Service Corporation (NSC) protests the award of a contract to Petroleum Terminal Management, Inc. (PTMI), under invitation for bids (IFB) No. DLA600-81-B-0286, issued by the Defense Fuel Supply Center, Defense Logistics Agency (DLA), for the operation, maintenance and protection of the Defense Fuel Support Point, Cincinnati, Ohio.

NSC primarily contends the contract should not have been awarded to the company because it is allegedly owned and controlled by a DLA employee. Moreover, the protester argues that the contract should be terminated because the DLA employee has violated conflict of interest prohibitions. We dismiss in part and deny in part the protest.

According to DLA, a conflict of interest investigation was conducted by the Agency in 1980. The upshot of this investigation was that the employee--an engineer for a DLA field activity, the Defense Contract Administration Services Region, Cleveland, Ohio--was found to substantially own and control PTMI's predecessor company, which was a partnership doing business as Petroleum Terminal Management. Thereafter, in July 1980, DLA was advised that the partnership had ended and that the "company has been incorporated"; moreover, an individual other than the DLA employee was to own "100% of the outstanding stock" in the corporation. Finally, the owner-president of the corporation stated that the DLA employee, a former partner in the predecessor organization, was "[then] neither an officer nor a stockholder of the company."

The contracting officer reports of investigative efforts subsequent to July 1980, as follows:

"* * * DLA report * * * was issued on 23 September 1980. It concludes, in pertinent part, that:

"[The employee] was originally an officer of PTMI, which holds a Government contract, but has since become an employee following incorporation of PTMI. DCASR Cleveland Counsel advised he no

longer feels subject is in a conflict of interest status.'

"In a series of telephone conversations in November 1981 * * * this Center confirmed the precise * * * duties of [the employee], as well as his part-time PTMI duties and concluded that the * * * Report of Investigation need not be disturbed. The following facts formed the basis for this conclusion:

"[The employee] is an engineer for the Systems and Engineering Branch of [the DCASR Area Office in] * * * Grand Rapids, [Michigan]. His duties bear no relationship to his work for PTMI and did not provide him with privileged information for the purpose of bidding on the Cincinnati Defense Fuel Support Point. [The employee's] duties with PTMI are of a general bookkeeping nature including maintaining general records and paying invoices.

"[The employee's] supervisor advised that while [the employee] might be involved in occasional preaward surveys, they are never for contracts outside the western Michigan area. Also, [the employee] has nothing to do with contracts after award has been made or with payments under any contracts.

"[The employee] did attend the pre-bid conference conducted * * * for this procurement. At the time he was still in his government position * * *. [His] attendance at this conference, assuming leave requirements were complied with, is not, in itself, improper conduct by a government employee."

Finally, DLA's Associate Counsel reports that the employee is "salaried [as a part-time bookkeeper] and owns no stock in the corporation" and that on the date of the prebid conference, attended by the DLA

employee as a representative of PTMI, the employee was on annual leave. Moreover, DLA states that the employee represented PTMI because--according to the employee--he "was the only PTMI employee available to attend."

Because of the above investigation, DLA is of the view that the employee does not now substantially own or control PTMI. Therefore, in DLA's view, the contract is not barred by Defense Acquisition Regulation (DAR) § 1-302.6(a) (DAC No. 76-28, July 15, 1981), which provides:

"Contracts shall not knowingly be entered into between the Government and employees of the Government or business organizations which are substantially owned or controlled by Government employees, except for the most compelling reasons, such as cases where the needs of the Government cannot reasonably be otherwise supplied."

NSC disagrees with the DLA conclusion that the cited regulation does not bar the contract. Specifically, the company suggests that the employee's part-time bookkeeper job is a sham and that he still substantially owns and controls PTMI. It is well established that the protester has the burden of proving its case. See Logicon, Inc., B-196105, March 25, 1980, 80-1 CPD 218. These allegations are merely conjecture without evidence leading to the conclusion that the employee still substantially owns or controls PTMI. NSC has failed to prove its case. For example, we do not consider that the employee's attendance at one prebid conference under the reason given shows that the employee now substantially controls PTMI.

On the issue of control, the protester has also furnished us with excerpts of a June 1980 DLA investigative report which shows that the employee was taking what appears to have been an active part on behalf of PTMI's predecessor in the management of a DLA contract in North Dakota. Assuming that the report shows that, as of the date of the report, the employee substantially controlled PTMI's predecessor organization, the

report cannot fairly be said to show that the employee now controls PTMI, which was organized after that date.

Next, the protester contends that the contract should be considered invalid because of alleged violation of conflict of interest prohibitions contained in applicable laws, an executive order, and regulations.

There is no statutory or regulatory authority for our Office to issue formal opinions on conflict of interest questions concerning officers and employees of other agencies; instead, the employing agency, the Department of Justice, and the courts have this authority. See Development Associates, 56 Comp. Gen. 580 (1977), 77-1 CPD 310. To the extent, therefore, that the protest requests our Office to issue a decision on the conflict of interest questions raised, we dismiss this ground of protest.

Our interest, within the confines of a protest, is to determine whether the employee may have exerted prejudice for, or bias on behalf of, PTMI--without regard to whether the employee may have also engaged in conduct constituting a conflict of interest. See J. L. Associates, Inc., B-201331.2, February 1, 1982, 82-1 CPD 99.

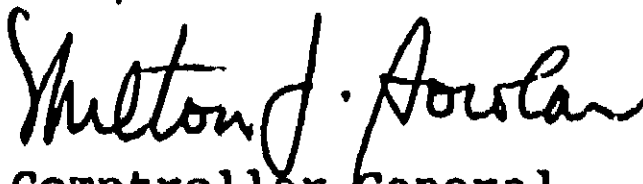
The protester, having the burden of proof, has offered no evidence to bolster its conjecture that PTMI may have obtained an improper advantage under this advertised procurement through the DLA employee. Specifically, we see no basis to question DLA's position that:

"Most [bidding] information [for this procurement] would generally be available to any contractor who requests it. PTMI has no access that is not available to other potential suppliers."

Moreover, the protester has not shown any improper act of the DLA employee concerning the affirmative responsibility determination made with respect to PTMI under this procurement. Thus, we find no basis, within our review standard of the conflict of interest allegations, to question the award.

Finally, NSC suggests that PTMI should not have been found to be responsible because it allegedly has never operated a "terminal of the size and complexity as that encountered at the Cincinnati facility" and because the Small Business Administration once refused to issue a certificate of competency to PTMI for a similar contract. It is our policy, however, not to review affirmative responsibility determinations with exceptions not pertinent to this final issue. Central Metal Products, 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Therefore, this issue is dismissed.

In view of the foregoing, we dismiss the part of the protest that relates to issues not reviewable by our Office and deny the other part.

for 
Comptroller General
of the United States